BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JEFFREY C. SHADDY	)	
Claimant	)	
	)	
VS.	)	
	)	
DART ENERGY CORPORATION	)	
Respondent	)	Docket No. 1,034,846
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the March 23, 2009 Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on July 22, 2009.

APPEARANCES

Kala Spigarelli, of Pittsburg, Kansas, appeared for the claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties stipulated that the 17.5 percent functional impairment assigned by the ALJ was not at issue and could be summarily affirmed. The parties also agreed that the only opinion as to task loss was rendered by Dr. Prostic and was 76 percent.

ISSUES

The ALJ held that the claimant was limited to a 17.5 percent functional impairment to the whole body for his injury because the claimant voluntarily terminated his accommodated employment thereby foreclosing his claim for permanent partial general (work) disability under K.S.A. 44-510e(a).

The claimant requests review of this decision alleging the ALJ erred in his analysis with respect to claimant's work disability claim. Claimant maintains that while respondent was accommodating his work restrictions, he was harassed by his new supervisor and was forced to quit. Claimant further argues that his permanent restrictions would not have allowed him to return to the oil field where had worked before his injury, and that any accommodated position respondent might have to offer would not have paid a comparable wage. Thus, he is entitled to a work disability of 88 percent, which reflects a 76 percent task loss and a 100 percent wage loss. Alternatively, claimant asserts that if a wage were to be imputed to him, the $320 per week wage he was earning in the accommodated position is the only credible evidence of what claimant could have earned had he remained in respondent's employ. Thus, his wage loss would be 62 percent and would result in a 69 percent work disability.

Respondent argues that the ALJ should be affirmed in all respects. Respondent contends the claimant should be entitled solely to his functional impairment because he voluntarily terminated his employment without cause at a time when accommodated duty was being provided. Moreover, respondent asserts that it would have been able to accommodate whatever restrictions would ultimately be imposed and place claimant back in the oil field earning a comparable wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The underlying facts relative to claimant's injury are not in dispute. Claimant sustained an injury to his left hip while working as a lead pumper on April 20, 2007. Medical treatment was provided, and on August 1, 2007 claimant underwent a left total hip replacement procedure. Thereafter, Dr. Dillon released claimant to return to work as of October 9, 2007 with restrictions of "no lifting over 30 pounds, no pushing, pulling over 30 pounds, no repetitive bending or stooping, no squatting or kneeling, no climbing stairs,

ladders or ramps. Should be sitting 80 percent of the time".[1] Dr. Dillon subsequently clarified his restriction regarding stair climbing to mean "[t]hat it should not be repetitive climbing stairs."[2] He further explained that claimant was certainly capable of climbing stairs in the ordinary course of his daily living.[3]

Claimant returned to accommodated work as a lease operator on October 10, 2007. This job required claimant to drive from location to location checking the equipment and taking readings. Claimant was allowed to self limit as needed and to call a co-worker for assistance when climbing a short ladder at a few of the sites he was required to visit. Shortly thereafter claimant advised respondent that getting in and out of his truck was bothering him. Respondent reassigned claimant to the office effective October 22, 2007. His supervisor was to be Jennifer Clines and he would be paid $8.00 per hour.

Beginning October 22, 2007 claimant reported for work. This office assignment lasted only one week as the record makes it clear that claimant and Ms. Clines did not work well together. Claimant worked only 24.5 hours during this calendar week as he was attending physical therapy appointments.

Ms. Clines was a newly hired Office Manager and it was her job to organize the office, something that had not been done in many years. Accordingly, there was a great deal of paperwork that needed to be organized, alphabetized and filed. Ms. Clines assigned claimant to alphabetize documents. This was a job he could do while sitting down and was the same task that she asked others in the office to perform. According to Ms. Clines, claimant demonstrated a bad attitude, was unwilling to work, was disruptive to the office, failed to communicate with her when he was leaving the office or wouldn't be able to work and overall, she was clearly displeased with his work behavior. She testified that claimant would frequently leave his desk and go up and down the stairs to chat with Bill Barks, his former supervisor.[4]

Claimant was counseled on two occasions during this week about his attitude. These meetings involved claimant, Ms. Clines, claimant's former supervisor and the operations manager of the facility, Bill Barks. Mr. Barks testified that claimant was obviously mad that Ms. Clines was taking him to task for his work behavior and suggested that she was "picking on him".[5] Mr. Barks also testified that claimant tried on many

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[1] Dillon Depo. at 11.

[2] *Id.* at 12.

[3] *Id.*

[4] Clines Depo. at 13.

[5] Barks Depo. at 12.

occasions to talk to him about this situation but that he referred claimant back to Ms. Clines as she was his supervisor. Mr. Barks indicated that he spoke to Ms. Clines at least once about the situation and she informed him that claimant wasn't performing his work duties, was spending an inordinate amount of time away from his desk and his attitude was very poor.

After the second counseling on October 27, 2007, claimant elected to take a leave of absence. Respondent invited claimant back to the accommodated office position but claimant did not return to work, voluntarily terminating his employment on November 29, 2007. When claimant applied for unemployment, he alleged that Ms. Clines not only harassed him but yelled at him, thus forcing him to quit his job. Neither Ms. Clines or Mr. Barks testified in those proceedings. The unemployment application was eventually approved and claimant received unemployment benefits.

While on unemployment claimant sought work 2 times per week. These efforts continued until April 29, 2008 when his application for social security disability was approved. His job search took him to "everywhere" in town, including Dave's Cessna, Wolfs and within the County of Montgomery. With no success he decided to move to Arkansas.

Mr. Barks testified that once claimant's treatment was concluded, any restrictions he would have been given could have been accommodated. Respondent intended on returning claimant to the lease operator position, at the same rate of pay he was earning before the accident, and that claimant would have been allowed to have assistance if needed, so as to comply with any restrictions he was given. He also says that claimant never told him he was being harassed by Ms. Clines, only that he was displeased with his work assignment. Mr. Barks indicated that it was his belief that claimant did not like working for Ms. Clines as he perceived her as unfair.[6]

Claimant was treated by Dr. William Dillon and upon his final release, Dr. Dillon imposed the following permanent restrictions "no lifting over 30 pounds, no pushing, pulling over 30 pounds, no repetitive bending or stooping, no squatting or kneeling, no repetitive climbing stairs, ladders or ramps and should be able to sit 80 percent of the time".[7]

Claimant was also examined by Dr. Edward J. Prostic, at his attorney's request. Dr. Prostic offered the following permanent restrictions: minimize climbing, squatting, kneeling and carrying. He should not lift more than 30 pounds knee height to shoulder height occasionally or half that much frequently. He should do minimal lifting or other activities

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[6] *Id.* at 39.

[7] Dillon Depo. at 11.

below knee height. He should not be required to stand and/or walk more than 20 minutes per hour.[8]

While there is no dispute about the ALJ's decision with respect to functional impairment, there is a dispute as to whether claimant is entitled to permanent partial disability benefits beyond the value of his 17.5 percent functional impairment in light of his decision to voluntarily terminate his employment with respondent.

Because claimant has sustained injuries that are not listed in the "scheduled injury" statute, his permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a). That statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the

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[8] Prostic Depo., Ex. 3 (Apr. 21, 2008 letter).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[11]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

Here, respondent argues that claimant is limited to his functional impairment because he did not make a good faith effort to retain his employment with respondent and that had he done so, he would have been returned to the lease operator job that would pay a comparable wage.[12]. Conversely, claimant argues that he made a good faith effort to retain his job as he attempted the assigned work but was nonetheless harassed by Ms. Clines, so much so that he was compelled to quit.

The ALJ concluded that claimant "voluntarily terminated his accommodated employment and is not entitled to a work disability."[13] Essentially, the ALJ concluded that claimant demonstrated a lack of good faith in his failure to retain his job in an accommodated position. The Board has carefully considered the evidence contained within the record and agrees with this aspect of the ALJ's Award.[14] Claimant was reassigned to work for Ms. Clines and worked in that position for approximately 24 hours during a one week period. In that span of time, he was counseled twice for his poor attitude. Ms. Clines indicated that claimant would not communicate with her, constantly left his assigned position and appeared not to want to work. Mr. Barks testified that claimant was "mad" about his assignment and it appeared that he resented working for a woman. This testimony is unchallenged by claimant. Instead, he maintains Ms. Cline

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[11] *Id.* at 320.

[12] Fringe benefits are not included in this figure. See the parties wage stipulation dated December 8, 2008.

[13] ALJ Award (Mar. 23, 2008) at 3.

[14] Pursuant to K.S.A. 2006 Supp. 44-555c(a), our standard of review is de novo.

"yelled" at him and harassed him into quitting. Yet, other than claimant's allegations, there is no one else who witnessed this conduct. Mr. Barks denied that claimant told him he was being harassed, only that he was displeased with his assignment. And while the unemployment referee awarded claimant benefits after concluding his decision to quit was appropriate, it appears that that referee did not have all of the evidence that is contained within this record.

In short, the Board finds that claimant failed to establish that he was, in fact, harassed into quitting his accommodated position. The greater weight of the evidence suggests that claimant wanted to work out in the field and resented being assigned to an office job with a female supervisor. Under these facts and circumstances, claimant's decision to quit supports the Board's decision to affirm the ALJ's conclusion that claimant demonstrated a lack of good faith.

However, the difficulty with the ALJ's decision to limit claimant's award to a functional award fails to take into account the undisputed fact that at the time he ceased working, the accommodated position he was assigned to paid him only $8.00 per hour, 40 hours per week. This wage falls far short of the $762.23 pre-injury wage. Thus, the ALJ arguably short-circuited the analysis compelled by *Copeland* as he failed to consider whether the accommodated wage or wage earning ability should have been imputed for purposes of considering the work disability component of claimant's claim.

At the time claimant left respondent's employ he was earning $8.00 per hour in the accommodated (office) job. He had not yet been released by Dr. Dillon, the treating physician. Mr. Barks testified that respondent could accommodate claimant's restrictions in the field, allowing him to call a co-worker to perform any tasks that would fall outside of those restrictions.[15] Mr. Barks says the lease operator job would have been at claimant's pre-injury wage, thus avoiding any wage loss.

The Board has considered the evidence on this issue and concludes that the wage claimant was earning at the time he terminated his employment, $320 per week, represents the claimant's capacity to earn wages for purposes of the work disability analysis and should be imputed to him. This translates to a wage loss of 58 percent when compared to his pre-injury wage of $762.23. While Mr. Barks testified that claimant's restrictions could have been accommodated and that he would have been placed back into the field as a lease operator, the Board finds that testimony is highly speculative. It seems respondent's argument is that whatever tasks claimant was restricted from doing while he was driving from well to well could be done by another employee, simply by placing a call.[16] That would seem to ignore the practicalities of claimant's job as a lease operator. He was

[15] Barks Depo. at 8.

[16] *Id.* at 17.

required to drive from location to location. Having another person drive to the same lease location to perform one aspect of the job would be inefficient and highly impracticable. Furthermore, claimant's permanent restrictions were not much different from his temporary restrictions that were being accommodated by having claimant work in the office instead of the field. For these reasons, the Board finds it difficult to accept that respondent's contention that whatever the restrictions, they could have been accommodated.

In summary, claimant is entitled to a 17.5 percent functional impairment until October 22, 2007, followed by a 67 percent work disability (based upon a 58 percent wage loss[17] and a 76 percent task loss[18]). The ALJ's Award is modified to reflect these findings.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated March 23, 2009, is affirmed in part and modified in part as follows:

The claimant is entitled to 28.24 weeks of temporary total disability compensation at the rate of $483.00 per week or $13,639.92 followed by 26.29 weeks of permanent partial disability compensation at the rate of $483.00 per week or $12,698.07 for a 17.50 percent functional disability followed by permanent partial disability compensation at the rate of $483.00 per week not to exceed $100,000.00 for a 67 percent work disability.

As of August 17, 2009 there would be due and owing to the claimant 28.24 weeks of temporary total disability compensation at the rate of $483.00 per week in the sum of $13,639.92 plus 93.19 weeks of permanent partial disability compensation at the rate of $483.00 per week in the sum of $45,010.77 for a total due and owing of $58,650.69, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $41,349.31 shall be paid at the rate of $483.00 per week until fully paid or until further order from the Director.

All other findings in the Award are affirmed.

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[17] This is based upon a pre-injury wage of $762.23, pursuant to the parties' stipulation.

[18] The parties stipulated that the only evidence as to claimant's task loss was the 76 percent opined by Dr. Prostic based upon Mr. Hardin's task analysis.

IT IS SO ORDERED.

Dated this _____ day of August 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge